Court File No.: 585/12

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

WABAUSKANG FIRST NATION

Applicant

- and -

The MINISTER OF NORTHERN DEVELOPMENT AND MINES, the DIRECTOR OF MINE REHABILITATION FOR THE MINISTRY OF NORTHERN DEVELOPMENT AND MINES

Respondents

- and -

RUBICON MINERALS CORPORATION

Respondent

FACTUM OF THE RESPONDENTS, THE MINISTER OF NORTHERN DEVELOPMENT AND MINES AND THE DIRECTOR OF MINE REHABILITATION FOR THE MINISTRY OF NORTHERN DEVELOPMENT AND MINES
(Application for Judicial Review to be heard April 15-17, 2014)

PART I – OVERVIEW

1. The Applicant, Wabauskang First Nation, challenges a decision to acknowledge receipt of a mine closure plan, principally on the basis that Ontario officials allegedly lacked jurisdiction to make the decision and because those officials allegedly failed to consult with the Applicant.

2. This Application had its genesis in a December 2, 2011 decision made by the Director of Mine Rehabilitation for the Ministry of Northern Development and Mines (the "Decision") to acknowledge receipt of a mine production closure plan (the "Production Closure Plan") filed by

Rubicon Minerals Corporation ("Rubicon") in respect of its proposed Phoenix Gold Project (the "Project"). The Decision was made pursuant to section 141(3)(a) of the *Mining Act*, R.S.O. 1990 c. M.14, as it then was.

3. The Project is located on the Applicant's asserted traditional lands within a portion of the Treaty 3 area, north of the English River, referred to herein as the Keewatin Lands. The Project site has been actively explored since 1922 and involves new production from an existing underground mine shaft. Above-ground, the Project is limited to the footprint of the existing mine site.

4. Ontario's ability to take up or authorize taking up of lands under the terms of Treaty 3 in the Keewatin Lands was the subject of an August 2011 judgment of Sanderson J. of the Ontario Superior Court of Justice: *Keewatin v. Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 ("*Keewatin*"). The Applicant's jurisdictional argument is based in large measure upon that judgment: the Applicant asserts that Ontario had no jurisdiction to make the Decision, because Sanderson J. concluded that Ontario could not take up or authorize taking up in the Keewatin Lands where such taking up would significantly interfere with Treaty 3 harvesting rights.[1]

5. In March 2013, the Court of Appeal reversed the trial decision in *Keewatin*, confirming that Ontario can take up or authorize taking up in the Keewatin Lands.[2] Accordingly, the judgment of Sanderson J. cannot be relied upon by the Applicant.

6. As observed by the Applicant, the Supreme Court of Canada will soon hear an appeal from the Court of Appeal's decision in *Keewatin*. Notwithstanding that appeal, Ontario had jurisdiction to make the Decision in question. First, the Court of Appeal's judgment is binding upon this Court. Second, even if the appeal is allowed and Sanderson J.'s decision is upheld, Ontario was entitled to make the Decision because it did not significantly interfere with Treaty 3 harvesting rights.

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[1] Applicant's factum, paras. 10-14, 39-40

[2] *Keewatin v. Ontario (Minister of Natural Resources)* (2013), 114 O.R. (3d) 401 (C.A.). Leave to appeal to the Supreme Court of Canada has been sought and granted: [2013] S.C.C.A. No. 215. A tentative hearing date is scheduled for May 15, 2014. The Applicant was a party intervener at the Court of Appeal and is now an appellant at the Supreme Court of Canada.

7. The Applicant alternatively challenges the Decision on the basis that Ontario failed to properly consult with the Applicant.

8. As the record reflects, Ontario carefully considered and made every effort to meet its consultation obligations. The consultation record demonstrates that Ontario took its consultation obligations very seriously. Ontario assessed the rights at issue, determined the scope of consultation that was necessary, corresponded with Wabauskang First Nation ("WFN") often, met with the community and, most importantly, considered measures to mitigate or accommodate the community's concerns. Furthermore, Ontario did not improperly delegate its duty to consult; it supported and carefully monitored the consultation efforts between Rubicon and WFN. This involved careful oversight and review of Rubicon's efforts, and assistance in finding and implementing measures to mitigate or accommodate any concerns raised. As such, there is no basis to challenge the Decision for want of consultation.

9. During the consultations, the concerns raised by the community focused on potential adverse impacts to its established treaty harvesting rights. As noted above, these concerns were considered and addressed, both by Rubicon and the Crown. Although never the focus of the consultation process at the time, in its factum and affidavit materials WFN now says that Ontario owed WFN a duty to consult with respect to asserted treaty rights of revenue-sharing and shared decision-making (these issues are not raised in the Notice of Application for Judicial Review). While Ontario submits that these assertions do not attract a duty to consult, the fact is that the Decision was only made after extensive consultation with WFN, which involved participation by WFN, and by which the community's concerns were heard and considered by the Crown in a meaningful way.

10. Lastly, the Applicant inordinately delayed in bringing this Application for Judicial Review; this Court should therefore decline to grant the relief sought and should dismiss the application.

PART II – FACTS

Facts Relied Upon by Applicant and by Rubicon in this Proceeding

11. These Respondents (sometimes "Ontario" or the "Province") do not accept as correct the Applicant's characterization of the material facts, including the description of the history of consultation efforts among WFN, Ontario and Rubicon.[3]

12. In his affidavit, Chief Cameron asserts that Treaty 3 entitles WFN to share in revenues generated from resource extraction activities on the community's asserted traditional lands, and that the community is entitled to participate in co-management of such activities.[4] These Respondents do not accept the opinions expressed by Chief Cameron in his affidavit.

13. These Respondents accept as correct the history of consultation relied upon by Rubicon in this proceeding.[5]

The Crown's Decision-Maker

14. The Crown's decision-maker in this case was Cindy Blancher-Smith, Director (the "Director") of the Ministry's Mineral Development and Lands Branch. The responsibilities of that branch includes:

a. Encouraging the sustained economic development of Ontario's mineral resources in an environmentally responsible manner, and in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*,[6] including the obligation to consult with potentially impacted Aboriginal communities; and

b. Administering Part VII of the *Mining Act*,[7] dealing principally with the rehabilitation of mines and mining lands in Ontario.

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[3] Affidavit of Chief Leslie Cameron, paras. 30-98, Application Record, pp. 16-34; Applicant's factum, paras. 6-25
[4] Affidavit of Chief Cameron, paras. 4, 12, 39, 41-45, Application Record, pp. 10, 11, 18-20
[5] Affidavit of Darryl Boyd, paras. 5-145, Responding Application Record of Rubicon, pp. 4-45
[6] *Constitution Act, 1982*, s. 35(1)
[7] *Mining Act*, R.S.O. 1990, c. M.14. Ontario's *Mining Act* was substantially amended pursuant to the *Mining Amendment Act, 2009*, which received Royal Assent on October 28, 2009. Section 2 of the *Mining Act* came into effect with Royal Assent; however many other provisions were subsequently proclaimed. This factum refers to the provisions of the *Mining Act* and Regulations in force at the relevant time and not the amendments that later came into effect, unless otherwise stipulated.

15. Part of Ms. Blancher-Smith's responsibilities as Director included her duties as Director of Mine Rehabilitation for the purposes of Part VII of the *Mining Act*. In this capacity she was responsible for exercising statutory discretion either to acknowledge receipt of certified closure plans or to return them for re-submission if they did not sufficiently address the legislatively prescribed reporting requirements, and if the Crown's duty to consult was not met. Ms. Blancher-Smith made the Decision to acknowledge receipt of the Production Closure Plan filed by Rubicon for the Project that is the subject of this Application for Judicial Review.[8]

The *Mining Act* and the "Mining Sequence"

16. The purpose of Ontario's *Mining Act* is to encourage mineral exploration and development in the province in a manner that respects section 35 Aboriginal and treaty rights. Section 2 of the Act declares:

> The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.[9]

17. Mining involves a number of stages that occur in a sequence, known as the "mining sequence." The mining sequence covers all aspects of mineral exploration and development, including prospecting, early and advanced mineral exploration, extraction of the desired materials (often referred to as "mine production") and, once a mine is closed, the restoration of all lands to their former use. The stages of the mining sequence are speculative in nature; only if each stage of the mining sequence proves successful will it lead to the next step in the process.[10]

18. The Project site was already developed when Rubicon acquired the rights to the site in 2002. Rubicon correctly describes the lands as a "brownfield" site in its factum. Thus, the Project entered the mining sequence at the advanced mineral exploration stage.[11]

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[8] Affidavit of Cindy Blancher-Smith, sworn February 4, 2014, paras.1-11, Responding Application Record of the Crown Respondents, pp. 1-4

[9] *Mining Act*, R.S.O. 1990, c. M.14, s. 2; Affidavit of Blancher-Smith, para.13, Crown's Responding Application Record, p. 4

[10] Affidavit of Blancher-Smith, para. 19, Crown's Responding Application Record, p. 7

[11] Affidavit of Blancher-Smith, para. 20, Crown's Responding Application Record, p. 7

19. Advanced exploration is governed by Part VII of the *Mining Act* and the supporting Regulations, and is defined to include:

a. Exploration carried out underground involving the construction of new mine workings, *expanding the dimensions of existing mine workings, or the reopening of underground mine workings*; [emphasis added]

b. Exploration that may alter, destroy, remove or impair any rehabilitation work done in accordance with Part VII of the Act or a filed closure plan;

c. Excavation of material in excess of 1,000 tonnes; or

d. Surface stripping on mining lands that exceeds prescribed limits.[12]

20. The next stage in the process, mine production, is governed by Part VII of the *Mining Act* and its supporting Regulations. Mine production is defined as mining that produces any mineral or mineral-bearing substance for immediate or future sale, and includes the development of a mine for such purposes.[13]

Closure Plans

21. Closure plans must be filed and acknowledged by the Ministry of Northern Development and Mines (the "Ministry") at the advanced exploration stage and again at the mine production stage before work in that stage of the mining sequence can begin.[14] A closure plan outlines how the affected lands will be rehabilitated and the costs associated with doing so. A closure plan is a living document, and can be amended as required throughout the life of a project.

22. This Application challenges the Director's acknowledgment that she received Rubicon's Production Closure Plan. Closure plans for mine production are governed by section 141of the *Mining Act*, and its supporting Regulation. Section 141 provides as follows:

> Mine production
> 141. (1) No proponent other than a proponent who is subject to a closure plan shall commence or recommence mine production without,
> ...

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[12] *Mining Act*, R.S.O. 1990, c. M.14, s.139(1); *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, s. 3

[13] *Mining Act*, R.S.O. 1990, c. M.14, s.139(1)

[14] Affidavit of Blancher-Smith, para. 23, Crown's Responding Application Record, p. 8; *Mining Act*, R.S.O. 1990, c. M.14, ss.140(1), 141(1)

(c) filing a certified closure plan with the Director as required under subsection (2); and
(d) receiving a written acknowledgment of receipt for the certified closure plan from the Director. 1996, c. 1, Sched. O, s. 26.

Closure plan
(2) After public notice has been given under clause (1) (b), the proponent shall file with the Director a closure plan certified in the prescribed form and manner certifying that the plan complies with the prescribed requirements. 1996, c. 1, Sched. O, s. 26.

Acknowledgment of receipt
(3) Within 45 days after the filing of the certified closure plan, the Director shall,
(a) acknowledge receipt, in writing, of the closure plan to the proponent; or
(b) return the closure plan for refiling if it does not sufficiently address all of the prescribed reporting requirements for a certified closure plan. 1996, c. 1, Sched. O, s. 26.[15]

23. Closure plans must be certified by company executives to ensure that they cover all of the conditions described in the Mine Rehabilitation Code of Ontario and that all outlined rehabilitation tasks meet the necessary technical requirements. The Mine Rehabilitation Code is Schedule 1 to Ontario Regulation 240/00.[16]

24. In order to ensure that rehabilitation work outlined in a closure plan is successfully performed, a financial guarantee or assurance equal to the estimated cost of the rehabilitation work must be included with the submission of a closure plan and is held in trust by the Ministry.[17]

25. Consultation with potentially affected Aboriginal communities is a requirement for the acknowledgement of a closure plan. Receipt of a closure plan is not acknowledged unless the Director is of the view that the Crown has met its consultation obligations. Section 12(2) of Regulation 240/00 provides as follows:

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[15] *Mining Act*, R.S.O. 1990, c. M.14, s.141; *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, ss.11-12
[16] Affidavit of Blancher-Smith, para. 24, Crown's Responding Application Record, p. 8; *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, ss. 4(1) and 12(2)
[17] Affidavit of Blancher-Smith, para. 27, Crown's Responding Application Record, p. 8; *Mining Act*, R.S.O. 1990, c. M.14, s.145(2)-(5), *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, s.13

> A closure plan filed under Part VII shall contain the following certificate signed by the proponent where the proponent is an individual, or the chief financial officer and one other senior officer where the proponent is a corporation:
>
> I (We) hereby certify that,
> ...
>
> (e) the proponent has carried out reasonable and good faith consultations with appropriate representatives of all aboriginal peoples affected by the project.[18]

26. Once the closure plan is filed with the Ministry, the Director has 45 days to either acknowledge receipt of the plan or return the plan for re-submission if it does not address the prescribed reporting requirements.[19]

27. A closure plan (including any and all amendments) must be implemented by the proponent who files it. The proponent shall restore the site to its former condition or to an alternate condition approved by the Director.[20]

Ontario's Consultation Process in This Case

28. To meet the Crown's consultation obligations with respect to mine development, Ministry staff engage a mine proponent at an early stage to ensure that the proponent involves potentially affected Aboriginal communities in discussions regarding the project.[21]

29. Rubicon's Phoenix Gold Project site is situated in the Red Lake area. The Project site has been actively explored since 1922, and land tenure was secured in the late 1940's, well before Rubicon's acquisition in 2002. The Project involves new production from an existing underground mine shaft. Above-ground, the Project is limited to the footprint of the previously patented site.[22]

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[18] *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, s.12(2)
[19] Affidavit of Blancher-Smith, para. 29, Crown's Responding Application Record, p. 9; *Mining Act*, R.S.O. 1990, c. M.14, s.141(3)
[20] Affidavit of Blancher-Smith, para. 35, Crown's Responding Application Record, p. 10; *Mining Act*, R.S.O. 1990, c. M.14, s.143(1); *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, s. 24(3)
[21] Affidavit of Blancher-Smith, para. 45, Crown's Responding Application Record, p. 12
[22] Affidavit of Blancher-Smith, para. 37, Crown's Responding Application Record, p. 10

30. With respect to the Project, Ministry staff engaged in consultation directly with WFN. In addition, they supported and carefully monitored the consultation process between Rubicon and WFN.[23]

31. The consultation with WFN regarding the Project began several years before the Production Closure Plan was filed in 2011. In or around 2008, Rubicon first filed a Notice of Project Status for advanced exploration with the Ministry as required under section 140(1)(a) of the *Mining Act*. The notice provided details about the Project.[24]

32. Once the Ministry received the Notice of Project Status, the Ministry began its consultation process. The Ministry review of the Project indicated that the activities proposed would not have a substantial impact on the environment of the site or the surrounding area. Ontario concluded that the potential for serious adverse impact on the established or asserted Aboriginal and/or treaty harvesting rights of Aboriginal communities was low. Ministry staff engaged in discussions about the Project with WFN, amongst other communities, and encouraged Rubicon to continue dialogue with those communities, including WFN.[25]

33. Rubicon filed an advanced underground exploration closure plan (the "Advanced Exploration Closure Plan") on January 16, 2009,[26] which was acknowledged by the Director on February 27, 2009. That plan and the consultation in relation to it were not challenged by the Applicant. [27]

34. Consultations by Rubicon continued in 2009 and 2010 while it pursued its advanced exploration activities.[28] In addition to ongoing consultations with respect to the Project, Rubicon began engaging in confidential communications regarding a proposed benefits agreement. WFN advised Rubicon that they had an agreement in principle with Lac Seul First Nation to share in a

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[23] Affidavit of Blancher-Smith, paras. 37-47, Crown's Responding Application Record, pp. 10-12
[24] Affidavit of Blancher-Smith, para. 48, Crown's Responding Application Record, p. 13
[25] Affidavit of Blancher-Smith, para. 49, Crown's Responding Application Record, p. 13
[26] *Mining Act*, R.S.O. 1990, c. M.14, s.140; *Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, ss.11-12; Affidavit of Blancher-Smith, para. 39, Crown's Responding Application Record, pp. 10
[27] Affidavit of Blancher-Smith, paras. 48-50, Crown's Responding Application Record, pp 13; Affidavit of Boyd, para. 16, Responding Application Record of Rubicon, p. 7
[28] Affidavit of Blancher-Smith, para. 51, Crown's Responding Application Record, p. 13

proposed benefits agreement, and that the two communities "stand together". Rubicon accordingly negotiated and consulted with WFN and Lac Seul First Nation together.[29]

35. After sending a Notice of Project Status for mine production in early 2011, Rubicon's first mine production closure plan was filed on February 18, 2011 (the "Initial Production Closure Plan").[30]

36. The Ministry's review of the Initial Production Closure Plan indicated that Rubicon's plans for production involved expanding existing underground workings and above-ground development of mine infrastructure, including a mill and tailings management area within the existing footprint of the Project site. The Ministry's assessment indicated that, like the advanced exploration activities, the potential for serious adverse impacts on established or asserted Aboriginal and/or treaty harvesting rights of Aboriginal communities was low.[31]

37. At first, WFN and Lac Seul First Nation were consulted together on the basis of their agreement in principle. However, on March 21, 2011, WFN advised the Ministry that its agreement with Lac Seul First Nation had been terminated and WFN required further consultation. Consequently, the Ministry expressed concerns to Rubicon about proceeding with the Initial Production Closure Plan as filed. The Ministry was concerned because, at that point in time, WFN required additional time to evaluate the Project and consider possible impacts of the Project on WFN's treaty harvesting rights. The Ministry wanted to ensure that WFN had been adequately consulted.[32]

38. The Ministry encouraged Rubicon to withdraw the Initial Production Closure Plan in order to give WFN time to retain an independent third party consultant to identify potential impacts and make recommendations for mitigation and accommodation of any potential impacts. Rubicon withdrew the plan, and an independent third party consultant was selected by WFN (and funded by Rubicon). Throughout the third party review, the Ministry actively took part in consultation with WFN, directly, and through its oversight of Rubicon's consultation efforts.

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[29] Affidavit of Blancher-Smith, para. 51, Crown's Responding Application Record, p. 13
[30] Affidavit of Blancher-Smith, para. 53, Crown's Responding Application Record, p. 14
[31] Affidavit of Blancher-Smith, para. 54, Crown's Responding Application Record, p. 14
[32] Affidavit of Blancher-Smith, paras. 55, 56, Crown's Responding Application Record, pp. 14-15

During that time the Ministry further encouraged Rubicon to delay re-submission of its closure plan a number of times to allow sufficient time for the third party review to be completed.[33]

39. Rubicon ultimately re-filed the Production Closure Plan on October 17, 2011, after it had addressed the concerns raised by the third party review, and implemented all of the recommendations outlined in that review. Significant consultation, both by Rubicon and the Ministry, occurred up to the date that the Decision was made on December 2, 2011.[34]

40. The consultation undertaken by the Ministry was extensive; it is described in detail in paragraph 58 of Ms. Blancher-Smith's affidavit. Those consultative efforts were a critical precursor to the Decision being made.[35]

The Decision

41. The Director was directly and actively involved in the consultation process; she was acutely aware of the efforts that had been made by the Ministry and Rubicon to consult with WFN. In reaching her Decision, Ms. Blancher-Smith also reviewed and considered the following[36]:

a. The Production Closure Plan;[37]

b. Rubicon's consultation logs, including its consultation log for WFN. These were appended to the Production Closure Plan;[38]

c. The Ministry's consultation log;[39]

d. The applicable legislation and regulations;

e. The third party review report, as well as further communications from WFN, Rubicon and the third party consultant with respect to the report;[40]

f. Documents provided to the Director by Ministry staff as a result of their review of the Production Closure Plan. In particular, Ms. Blancher-Smith received a spreadsheet

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[33] Affidavit of Blancher-Smith, para. 56, Crown's Responding Application Record, pp. 14-15
[34] Affidavit of Blancher-Smith, para. 57, Crown's Responding Application Record, p. 15
[35] Affidavit of Blancher-Smith, para. 58, Crown's Responding Application Record, pp. 15-25
[36] Affidavit of Blancher-Smith, paras. 61-62, Crown's Responding Application Record, pp. 26-27
[37] A copy of the Production Closure Plan is attached as Exhibit "E" to Affidavit of Blancher-Smith.
[38] A copy of the Rubicon's consultation logs are attached as Exhibit "UU" to Affidavit of Blancher-Smith.
[39] A copy of the Ministry's consultation log is attached as Exhibit "VV" to Affidavit of Blancher-Smith.
[40] The third party review report is attached as Exhibit "WW" to Affidavit of Blancher-Smith.

itemizing WFN's concerns as provided by the third party consultant, and a document prepared by Rubicon detailing its responses to WFN's concerns.[41]

42. One of the key considerations in the Director's assessment of the sufficiency of consultation was WFN's third party review report and the response to that report by Rubicon. Rubicon addressed the impacts described in the third party review report, which focused on potential impacts to the environment and WFN's treaty harvesting activities, and implemented all of the recommendations outlined before it re-filed the Production Closure Plan on October 17, 2011. These accommodation measures are included in the Production Closure Plan and they represent commitments by Rubicon that are enforceable by Ontario.[42]

43. The consultation conducted with Aboriginal communities, including WFN, was a critical component in Ms. Blancher-Smith's consideration about whether to acknowledge receipt of the Production Closure Plan. She carefully reviewed the consultation record, the concerns raised by WFN, and the measures undertaken and commitments made to accommodate and mitigate concerns. After considering these various factors, Ms. Blancher-Smith was satisfied that the consultation process was sufficient. She concluded that the Crown had met its duty to consult and that the Decision could properly be made. She acknowledged receipt of the Production Closure Plan on December 2, 2011 because, in her view, all of the prescribed requirements were fulfilled.[43]

44. As a result of the Decision at issue, Rubicon has undertaken further work on developing the mine.[44]

45. The Ministry has remained in contact with Rubicon over the past two years to ensure that it is adhering to commitments made to Aboriginal communities, including WFN, in the company's Production Closure Plan. Many of the commitments made by Rubicon in its Production Closure Plan will become operative only once the mine is to be closed. The Ministry

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[41] Copies of these documents are attached as Exhibit "XX" and "YY" to Affidavit of Blancher-Smith.
[42] Affidavit of Blancher-Smith, para. 63, Crown's Responding Application Record, p. 27
[43] Affidavit of Blancher-Smith, paras. 64-65, Crown's Responding Application Record, p. 27
[44] Affidavit of Boyd, paras. 130-142, Responding Application Record of Rubicon, pp. 40-41

will continue to monitor Rubicon's efforts to ensure that the accommodation measures incorporated in the Production Closure Plan are implemented.[45]

46. Of critical importance is that the process of consultation with the Applicant and other affected Aboriginal communities remains an ongoing one. That consultation will not cease until the mine workings are closed and the Production Closure Plan is fully implemented.[46]

PART III – ISSUES AND LAW

47. In this Application for Judicial Review, WFN challenges the Decision on the basis that Ontario did not have jurisdiction to acknowledge receipt of the Production Closure Plan as a result of the trial level decision in *Keewatin*. In the alternative, WFN claims that Ontario failed to discharge its duty to consult.

48. Accordingly, Ontario respectfully submits that the issues before this Court are as follows:

a) Do the *Keewatin* decisions deprive the Director of the authority to make the Decision;

b) Did Ontario discharge its obligation to consult with the Applicant; and

c) Should this Court decline to grant the relief sought because of the Applicant's delay in bringing this proceeding.

A. *Keewatin* Does Not Deprive the Director of the Authority to Make the Decision

i) *Keewatin* Court of Appeal Decision Confirms Ontario Can Take Up Lands Pursuant to Treaty 3

49. The Applicant invokes the trial decision from *Keewatin* as the primary basis for this Judicial Review Application, claiming that the Director was "without jurisdiction" to accept the Production Closure Plan. In *Keewatin,* Sanderson J. held at trial that Ontario could not take up or authorize the taking up of tracts of land for forestry, within the meaning of Treaty 3, without Canada's consent, if doing so risked invoking a significant interference with Treaty 3 harvesting rights.

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[45] Affidavit of Blancher-Smith, paras. 63-68, Crown's Responding Application Record, pp. 27-28
[46] Affidavit of Blancher-Smith, para. 68, Crown's Responding Application Record, p. 28

50. The Court of Appeal for Ontario overturned the trial decision in *Keewatin*, citing the "many errors" made by the trial judge.[47] The Court of Appeal's decision in *Keewatin* confirms that Ontario has the constitutional competence to take up lands for forestry and other purposes.[48]

51. The Applicant relies exclusively on the *Keewatin* trial decision, based on the fact that the Director accepted the Production Closure Plan on December 2, 2011, that is, after the trial decision, but five days prior to the December 7, 2011 order of the Court of Appeal staying the trial decision pending the outcome of the appeal.[49]

52. The Applicant's position is mistaken; the Court of Appeal decision in *Keewatin* governs the question of Ontario's constitutional competence to take up and authorize taking up in the Keewatin Lands pursuant to Treaty 3. The judgment has retroactive effect and application, and supersedes the trial judgment. This Court is now bound by the Court of Appeal judgment. That judgment did not change the law, it merely confirmed Ontario's ability to take up lands within the Keewatin Lands as has occurred from the time the Keewatin Lands were added to Ontario in 1912.[50] The fact that the Court of Appeal's decision had not yet been released at the time the Decision was made is of no consequence today.

ii) Ontario Had Authority to Take Up Lands Even Based on *Keewatin* Trial Decision

53. Even if the *Keewatin* trial decision applied to this proceeding, which it does not, the Director still would have had the constitutional competence to acknowledge receipt of the Production Closure Plan.

54. On the basis of the wording in Treaty 3 that refers to the ability of the "Government of the Dominion of Canada" to take up lands under the treaty, Sanderson J. held that federal government authorization or First Nation consent was required for activities in the Keewatin lands that *significantly interfere* with Treaty 3 harvesting rights. Put another way, Sanderson J.

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[47] *Keewatin v. Ontario (Minister of Natural Resources)*, *supra*, para. 23
[48] *Keewatin v. Ontario (Minister of Natural Resources)*, *supra*, paras. 201-212
[49] Applicant's Factum, para. 11
[50] *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, paras. 84-87

held that Ontario retains the constitutional competence to validly authorize land uses, so long as such land uses do not significantly interfere with the exercise of treaty harvesting rights.[51]

55. The Applicant, in paragraph 10 and elsewhere in its factum, suggests that Ontario cannot authorize land uses where doing so would result in a *prima facie* infringement of its treaty rights, which according to the Applicant is anything more than an insignificant interference with the treaty right. However, this is a distinction without a difference.

56. The Decision did not cause significant interference with treaty harvesting rights. Ontario considered the potential impact of Rubicon's activities on WFN's treaty harvesting rights upon receipt of each closure plan. In all cases, Ontario determined that Rubicon's activities would not significantly impact the environment surrounding the Project site, and accordingly, the potential for adverse impacts on WFN's established or asserted Aboriginal and/or treaty harvesting rights was low.

57. Ontario accepts and adopts the submissions of Rubicon in this regard, as set out in paragraphs 5b, 6, 13, 18, 19, 28, 35, 37-39 and 41-42 of Rubicon's factum. WFN has not identified any significant impacts to contradict the Decision made by the Director.

58. Similarly, a report submitted by a third party retained by the Applicant identified limited impacts on WFN's treaty harvesting rights. To the extent that the third party report identified potential impacts on WFN's treaty harvesting rights, the Director noted that Rubicon addressed these impacts and implemented all of the recommendations outlined before it re-filed its Production Closure Plan. The Director identified Rubicon's accommodation measures as one of the key considerations in accepting the Production Closure Plan.[52]

59. Accordingly, the trial decision in *Keewatin* would not deprive Ontario of the ability to make the Decision to accept the Production Closure Plan as provided for in Part VII of the *Mining Act*, even if the Court of Appeal had not reversed that decision, or in the event that the trial decision is upheld by the Supreme Court of Canada.

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[51] *Keewatin v. Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 (Sup. Ct.), paras. 1452, 1570, 1582-1584, 1587-1589

[52] Affidavit of Blancher-Smith, paras. 62-63, Crown's Responding Application Record, pp. 26-27

60. Additionally, Ontario's constitutional competence or the applicability of the *Mining Act* and its associated regulations are not properly before this Court. The Applicant has not delivered a Notice of Constitutional Question as required pursuant to section 109 of the *Courts of Justice Act*.[53]

iii) The Relief Sought Would Serve No Useful Purpose

61. In addition, quashing the Decision would serve no useful purpose. This Court may decline to award prerogative relief when doing so would have no practical effect, invoking what has since been referred to as the doctrine of futility.[54]

62. If the Decision was quashed, Ontario would reconsider whether to acknowledge receipt of the Production Closure Plan. The Court of Appeal decision in *Keewatin* would unquestionably apply when Ontario considered the decision anew, which decision makes clear that Ontario has the constitutional competence to acknowledge receipt of the Production Closure Plan. Accordingly, quashing the Decision would have no practical effect and such relief should not be granted.

B. Ontario's Consultation with WFN

63. The Notice of Application for Judicial Review alleges that Ontario breached its duty to consult because it delegated its consultative obligations to Rubicon.[55] The Affidavit of Chief Cameron and the Applicant's factum raise new grounds for review. The Applicant now asserts that Ontario had a duty to consult WFN regarding asserted treaty rights to revenue-sharing and shared decision-making before the Decision was made.

64. Recent jurisprudence from the Supreme Court of Canada has underscored that the purpose of section 35 is to facilitate reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. This means that the Crown must balance societal and Aboriginal interests when making decisions that may adversely impact existing or asserted

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[53] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109(1), (2), (4)

[54] *Amalorpavanathan v. Ontario (Minister of Health and Long-term Care)* (2013), 313 O.A.C. 29 (Div. Ct.), para. 15; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, p. 228; See also *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)* (2009), 95 Admin. L.R. (4th) 229 (S.C.), paras. 35-36

[55] Notice of Application, para. 2p), Application Record, Volume I, Tab 1, p. 7

Aboriginal and treaty rights.[56] The Crown's duty to consult is one mechanism identified by the Supreme Court of Canada to address and achieve that balance. As earlier noted, this obligation is acknowledged in section 2 of the *Mining Act*.[57]

65. Although the Crown must consult with a First Nation when the duty to consult is triggered, there is no requirement to reach consensus or agreement; First Nation consent is not a requirement of Crown decision-making, and a First Nation does not enjoy a veto over such decision-making. Failure to reach consensus does not mean that the Crown did not comply with its consultation obligations.[58]

66. The duty to consult is engaged when three elements exist: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) there is contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal or treaty claim or right.[59]

67. The content of the duty varies with the factual circumstances of each case and takes into account the strength of the claim and the nature and likely effect of the anticipated impact. It is measured on a sliding scale:

> The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.[60]

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[56] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, para. 45
[57] *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 25-28
[58] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550, para. 22; *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 44
[59] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, para. 31; *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 35
[60] *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 37

68. Consultation is a "two way street" and good faith on both sides is required. There is an obligation cast upon a First Nation to set out its interests and concerns and to respond to the Crown's attempts to meet those concerns.[61]

i) Reasonableness Standard Appropriate in This Case

69. The existence and extent of the duty to consult or accommodate is a question of law to be judged on a standard of correctness. Nevertheless, as the Supreme Court of Canada emphasized in both *Haida Nation v. British Columbia (Minister of Forests)* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the existence and scope of the duty to consult is typically premised on an assessment of the facts, becoming a question of mixed fact and law subject to review on a standard of reasonableness. As noted by the Applicant at paragraph 56 of its factum, consultation "is a distinct and often complex constitutional process, and in certain circumstances, a right involving facts, law, policy and compromise."[62]

70. Contrary to the submissions found at paragraphs 29 and 30 of the Applicant's factum, the process of consultation itself is reviewable on a reasonableness standard. As observed by the Supreme Court in *Haida*, "[w]hat is required is not perfection, but reasonableness."[63]

71. In *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines),* the British Columbia Supreme Court considered and rejected an application for judicial review of a decision to permit mining on land subject to disputed Aboriginal rights. The conclusion of the court on the standard of review applies the distinction drawn in *Haida* and *Rio Tinto*:

> Whether a duty to consult and, if indicated, to accommodate existed is clearly a question of law, and was never in doubt in this case. Not only did the Crown acknowledge the existence of such a duty throughout, but the Crown had also entered into a Consultation Agreement with the DTFN aimed at covering the very sort of situation that arose. But when it comes to the Crown's assessment of the scope and extent of that duty, I conclude that in the circumstances of this case,

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[61] *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 42; *Kwakiutl First Nation v. North Island Central Coast Forest District,* 2013 BCSC 1068, paras. 160-161; *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, para. 42

[62] *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 61-63; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, paras. 64-65; *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* (2013), 51 B.C.L.R. (5th) 380 (S.C.), paras. 97-105

[63] *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 61-63; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, paras. 64-65; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 53; *Ahousat First Nation v. Canada (Fisheries and Oceans)* (2008), 297 D.L.R. (4th) 722 (F.C.A.), para. 54; *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines), supra*, paras. 97-105

> the "correctness" of the Crown's assessment depends upon the "reasonableness" of that assessment's underpinning. We have a question of mixed law and fact so the standard, in effect, becomes one of reasonableness as noted in the passage from *Haida Nation* quoted above.[64]

72. Ontario recognized at the outset that acceptance of the Production Closure Clan could give rise to a duty to consult. Upon receipt of Rubicon's Production Closure Plan, Ontario conducted an assessment of the facts to determine what, if any, levels of consultation were required in the circumstances, and acted accordingly. The Production Closure Plan was accepted only after the Director was satisfied that the consultation conducted by Rubicon and Ontario exceeded the Crown's duty to consult in the circumstances. A review of whether the Director properly concluded that Ontario met its obligations with respect to the duty to consult is therefore a question of mixed fact and law, and attracts a standard of reasonableness.

ii) Ontario Complied With its Consultation Obligations

73. Ontario's submission is that the duty to consult in this case was at the low end of the spectrum. First, the activities at issue involve off-reserve lands ceded under a treaty, and those lands are subject to taking up. Partly on this basis, in *Mikisew Cree First Nation v. Canada*, Justice Binnie said that the duty may lie at the lower end of the spectrum:

> In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum.[65]

74. Second, a mine-site already existed, and above-ground, the Project is limited to the footprint of the existing mine site, while the potential for off-site impacts to asserted and/or established Aboriginal or treaty rights is limited. Rubicon had already filed an Advanced Exploration Closure Plan and consultation had been carried out without complaint prior to the acceptance of that plan. Accordingly, the Director properly focused her attention on any novel potential adverse impacts arising from the Decision.

75. Even though Ontario assessed the duty to consult to be at the lower end of the spectrum, the consultation efforts far exceeded what was required in the circumstances. There is an

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[64] *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, *supra*, para. 108
[65] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64

extensive record of Ontario's consultation efforts in relation to this Project and effective consultation was achieved in the following ways.

76. First, Ontario engaged in consultation directly with WFN throughout the relevant period, starting from the delivery of the Notice of Project Status for advanced exploration in or around 2008. Ministry staff, including the Director, attended and participated in several meetings, up to a few days before the Decision was made on December 2, 2011.[66]

77. In addition, Ontario supported and carefully monitored the consultation efforts between Rubicon and WFN, which started as early as 2008. This involved careful oversight and review of Rubicon's efforts, and assistance in finding measures to mitigate or accommodate any concerns raised. For example, in the months leading up to the decision to acknowledge receipt of the Production Closure Plan, Ontario participated in a weekly teleconference with Rubicon. This allowed Ontario to be kept apprised of the consultation efforts, and gave Ontario the opportunity to provide feedback on those consultation efforts with a view to ensuring that WFN's concerns were being heard and addressed.[67]

78. In considering whether to acknowledge receipt of the Production Closure Plan, Ontario carefully reviewed the consultation record, the concerns raised by WFN, and the measures undertaken and commitments made to accommodate and mitigate any concerns. After considering these various factors, Ontario was satisfied that the consultation process was sufficient and that the Crown had met its duty to consult.[68]

iii) Ontario Did Not Improperly Delegate Duty to Consult

79. Ultimate legal responsibility for consultation and accommodation rests with the Crown. Nevertheless, the Crown can delegate procedural aspects of the consultation process to third parties such as Rubicon, while retaining ultimate responsibility for the adequacy and outcome of consultations.[69]

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[66] Affidavit of Blancher-Smith, paras. 45-58, 62, Crown's Responding Application Record, pp. 13-26
[67] Affidavit of Blancher-Smith, paras. 45-58, Crown's Responding Application Record, pp. 13-25
[68] Affidavit of Blancher-Smith, paras. 64, Crown's Responding Application Record, p. 27
[69] *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 53

80. The Court in *Haida* did not elaborate on what aspects of consultation were procedural and could be delegated. In subsequent jurisprudence, courts have concluded that delegation of "operational" and "consultative steps" is appropriate. Where the development of resources is at issue, the Crown may delegate procedural aspects of the duty to consult to third parties, provided the Province maintains a supervisory role in the consultation process and ensures that consultation is adequate.[70]

81. From its initial receipt of Rubicon's Advanced Exploration Closure Plan through to acceptance of the Production Closure Plan, Ontario supported and carefully monitored and provided oversight to Rubicon regarding the company's consultation efforts with the Applicant. As noted above, this involved determination of the scope of consultation required, and communication of these expectations to Rubicon. It also involved oversight and review of Rubicon's efforts, including providing ongoing feedback on the adequacy of consultation, and assisting to identify measures to mitigate or accommodate concerns raised by the Applicant concerning its treaty rights.

82. At no time did Ontario simply accept Rubicon's position about the sufficiency of consultation. In fact, shortly after Rubicon first filed its closure plan relating to mine production on February 17, 2011, Ontario expressed concerns about proceeding with the closure plan as filed. Ontario was concerned because, at that point in time, WFN had advised the Ministry that its agreement with Lac Seul First Nation had been terminated and that WFN required further consultation in order to evaluate potential impacts of the Project on WFN's treaty rights. Ontario needed this information to adequately assess the sufficiency of consultation and accommodation efforts.[71]

83. As a result, Ontario encouraged Rubicon to withdraw that closure plan; this gave WFN the time to retain an independent third party consultant to review the closure plan, identify impacts and make recommendations for mitigation and accommodation of any impacts. Throughout the third party consultation process, Ontario actively took part in consultation with WFN, directly, and through its oversight of Rubicon's consultation efforts. During that time,

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[70] *Wahgoshig First Nation v. Solid Gold Resources Corp et al.* (2011), 108 O.R. (3d) 647 (Sup. Ct.), para. 43; *Yellowknives Dene First Nation v. Canada (Attorney General)* (2010), 377 F.T.R. 267, para. 93

[71] Affidavit of Blancher-Smith, paras. 15, 58e) – f), Crown's Responding Application Record, pp. 14, 16, 17

Ontario encouraged Rubicon to delay re-submission of its closure plan a number of times to allow sufficient time for the third party review to be completed.[72]

84. Rubicon addressed the impacts raised by the third party review, which focused on potential impacts to the environment and WFN's treaty harvesting rights, and implemented all of the recommendations outlined in the third party review before it re-filed the Production Closure Plan on October 17, 2011. These accommodation measures are included in the Production Closure Plan and they are commitments that are enforceable by Ontario.

85. The Director only accepted the Production Closure Plan after she was satisfied that the consultation process was sufficient. A key consideration in concluding that the consultations were sufficient was the findings of the Applicant's third party consultant and the accommodation measures put in place to address the findings.[73]

86. The Applicant at paragraphs 54-57 of its factum asserts that Ontario's delegation of aspects of consultation to Rubicon was impermissible, because Rubicon lacked the ability to fulfill the Crown's constitutional obligations, and lacked the remedial authority to effect accommodation of the Applicant's treaty rights. This submission mischaracterizes the consultation arrangement between Rubicon and Ontario, and the nature of permissible delegation. At all times, Ontario retained responsibility for ensuring the sufficiency of consultation, and retained remedial authority to ensure the Applicant's rights were protected. This remedial authority included, but was not limited to, the authority to reject Rubicon's Production Closure Plan if the Director was of the view that the duty to consult had not been met.

iv) No Duty to Consult on Asserted Right to Revenue-Sharing

87. Ontario does not accept that WFN has a right to revenue-sharing pursuant to Treaty 3. It is Ontario's submission that the assertion of a treaty right to revenue-sharing does not give rise to a duty to consult in the circumstances of this case.

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[72] Affidavit of Blancher-Smith, para. 56, Crown's Responding Application Record, pp. 14, 15
[73] Affidavit of Blancher-Smith, para. 63 Crown's Responding Application Record, p. 27

88. As stated above, the duty to consult is engaged when three elements exist: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) there is contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal or treaty claim or right.[74]

89. With respect to the first element, asserted rights claims must be credible and outlined with clarity. Claimants must focus on the scope and nature of the rights they assert. [75] Here, only non-specific allegations were made by WFN with respect to revenue-sharing.

90. Though WFN has now complained about consultation related to its asserted treaty right of revenue-sharing in its factum and affidavit materials (this is not raised in the Notice of Application for Judicial Review), during the consultations the concerns raised by the community focused on potential adverse impacts to treaty harvesting rights. These concerns were considered and addressed, both by the Crown and Rubicon. Furthermore, the record before this Court shows that the assertion of a treaty right to revenue-sharing - at the time framed as sharing in the benefits from the use of the land and resources - was rarely raised, not outlined with clarity or specificity, and not pursued during the consultation process.

91. Even if the assertion made was sufficient to trigger a duty to consult, the Decision to acknowledge the Production Closure Plan for filing did not adversely affect any possibility of revenue-sharing. For the duty to consult to be engaged, WFN was required to show a causal relationship between the Decision and the potential for adverse impacts on its ability to share in revenues:

> The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.[76]

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[74] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, para. 31; *Haida Nation v. British Columbia (Minister of Forests), supra*, para. 35

[75] *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 36; *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* (2013), 49 B.C.L.R. (5th) 302 (C.A.), para. 123, leave to appeal to SCC ref'd February 27, 2014 (unreported); *Kwakiutl First Nation v. North Island Central Coast Forest District, supra*, para. 152

[76] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, para. 45

92. During the consultation process at issue, WFN failed to demonstrate how the Decision could cause harm to an asserted right to revenue-sharing, and it has not provided any evidence of adverse impacts to this Court in its Application Record.

93. During the consultation process the Applicant suggested that if the Crown made the decision to accept the Production Closure Plan, WFN may no longer have bargaining power to negotiate an impact benefit agreement with Rubicon.[77] The Supreme Court has stated that an adverse effect for the purposes of consultation does not include adverse impacts to the negotiating position of an Aboriginal community:

> Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. ...[C]ut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.[78]

94. Even if the Decision at issue is regarded as having some impact on the asserted treaty right of revenue-sharing, any impact would be compensable, as the nature of revenue-sharing is monetary. The purpose of the duty to consult is to ensure that resources are developed in a way that prevents *irreversible* harm to asserted Aboriginal interests:

> Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27, 33).[79]

95. If the Decision at issue is regarded as having some impact on the asserted treaty right of revenue-sharing (which Ontario submits it did not), the Decision in no way can be said to have caused irreversible harm to WFN's asserted interest to share in revenues in the Project.

96. Consultation is not a mechanism to provide immediate fruition of a claimed right. Rather, consultation is an interim measure:

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[77] Affidavit of Chief Cameron, Exhibit "YY", Application Record, p. 615
[78] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, para. 50
[79] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*, para. 46, see also paras. 32-34, 83; See also: *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 30, 32-33; *Kwakiutl First Nation v. North Island Central Coast Forest District, supra*, para. 125; *Ka'A'Gee Tu First Nation v. Canada (Attorney General)* (2012), 406 F.T.R. 229, para. 122

> The duty to consult is not intended to provide Aboriginal people immediately with what they could be entitled to, if and when they prove their claims or settle them through treaty. Otherwise, there would be no incentive for Aboriginal people to negotiate treaties or seek to prove their claims. The duty to consult, therefore, is not meant to be an alternative to comprehensive land claims settlements, but a means to ensure that the land and the resources that are the subject of the negotiations will not have been irremediably depleted or alienated by the time an agreement is reached.[80]

97. Where claims have been made for economic rights flowing from an assertion of Aboriginal title, courts have held that judicial review proceedings are not the appropriate avenue to consider whether First Nations should be compensated for adverse impacts to asserted title. Financial accommodation has been found not to be a proper issue for judicial review, as it presumes the right exists and has been proven to have been adversely affected.[81]

98. In any event, there were extensive discussions between Rubicon and WFN with respect to sharing the benefits from the Project. At WFN's request, Ontario was excluded from participating in any of these discussions. Nevertheless Ontario remained in contact with Rubicon and WFN about the progress of their discussions about sharing in the benefits of the Project. Ontario adopts paragraphs 55 and 56 of Rubicon's factum in this respect. Ontario's discussions with WFN and Rubicon are ongoing.

v) Shared Decision-Making

99. WFN asserts that Treaty 3 gives it a right to shared decision-making. Like the assertion about revenue-sharing, in its affidavit and factum WFN argues consultation flows from this assertion.

100. Any assertion that WFN was entitled to share in the Province's decision-making was not outlined with clarity or specificity, and not pursued during the consultation process. In fact, the assertion only surfaced in or around the week before Decision was made, even though consultations had been ongoing for months.

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[80] *Ka'A'Gee Tu First Nation v. Canada (Attorney General), supra*, paras. 121- 123; *Haida Nation v. British Columbia (Minister of Forests), supra,* para. 20; *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* (2011), 338 D.L.R. (4th) 658 (S.C.), para 152, aff'd (2013), 49 B.C.L.R. (5th) 302 (C.A.), leave to appeal to SCC ref'd February 27, 2014 (unreported); *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)* (2013), 50 B.C.L.R. (5th) 86 (S.C.), para. 100

[81] *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations) supra*, paras. 94-95; *Ka'A'Gee Tu First Nation v. Canada (Attorney General), supra,* paras. 121-123

101. Although WFN frames its assertion as a treaty right to share in decision-making, what the community appears to be seeking is a veto over the Project. The Supreme Court of Canada has said that consultation does not give Aboriginal communities a veto and there is no duty to agree:

> However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation.
>
> [...]
>
> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[82]

102. Even if the duty to consult was engaged by WFN's assertion to shared decision-making, the fact remains that WFN actively participated in a meaningful way throughout the consultation process, and was afforded opportunities throughout to raise its concerns about the Project. A third party reviewer was retained to identify potential impacts of the Project on WFN, and the accommodation and mitigation measures identified were incorporated into the Production Closure Plan. Such meaningful consultation with WFN informed Ontario's Decision, which was made only after participation of WFN and full consideration of WFN's concerns.

C. This Court Should Decline to Grant the Relief Sought

103. This Court's supervisory jurisdiction over administrative decisions is discretionary. The Court may decline to provide relief, even if an applicant establishes a ground where the Court may intervene in the administrative process.[83]

104. If this Court finds that Ontario has not met its consultation obligations with respect to the Decision, the appropriate remedy is not to quash the Decision, but rather to direct Ontario and WFN to engage in further consultations.[84]

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[82] *Haida Nation v. British Columbia (Minister of Forests), supra*, paras. 10, 42, 48; See also: *Beckman v. Little Salmon/Carmacks First Nation,* [2010] 3 S.C.R. 103, para. 14

[83] *Jeremiah v. Ontario* (2008), 83 Admin. L.R. (4th) 126 (Div. Ct.), para. 44

[84] *Kwakiutl First Nation v. North Island Central Coast Forest District, supra*, paras. 175, 176

105. Furthermore, the Court may decline to hear an application for judicial review, or may decline to grant a remedy, where there has been inordinate delay in commencing the judicial review proceeding.[85]

106. This Court recently identified three determining factors when considering whether to dismiss an application for delay: the length of the delay, the reasonableness of any explanation offered for the delay, and any presumed or actual prejudice suffered by the respondent as a result of that delay.[86]

107. This Court has repeatedly held that a delay in excess of six months in bringing a judicial review application may be grounds for refusing the remedy sought.[87]

108. Ontario acknowledged receipt of the Production Closure Plan on December 2, 2011. The Director copied the applicant on a letter to Rubicon dated December 2, 2011 acknowledging receipt of the Production Closure Plan.[88] The Applicant did not file a Notice of Application for Judicial Review until December 20, 2012, more than one year after the Decision it seeks to overturn.

109. There is no justification for the Applicant's delay. The Applicant seeks a judicial review of the Director's decision based on two assertions: that Ontario lacked jurisdiction to accept the Production Closure Plan and that, in the alternative, Ontario failed to discharge its duty to consult. With respect to the first assertion, the Applicant states that the trial decision in *Keewatin* "is the primary basis for [their] judicial review." Though the Court of Appeal has since overturned the trial decision in *Keewatin*, the Applicant contends that the appeal decision is irrelevant, and relies exclusively on the trial decision.

110. The trial decision in *Keewatin* was released on August 16, 2011, or several months *before* Ontario accepted the Production Closure Plan. The Applicant was aware of that decision; on

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[85] *PPG Industries Canada v. A-G Canada*, [1976] 2 S.C.R. 739, p. 749; *Re Harelkin and University of Regina,* [1979] 2 S.C.R. 561 pp. 574-575; *Jeremiah v. Ontario, supra,* para. 45

[86] *Becker v. Ontario*, 2012 ONSC 6946 (Div. Ct.), para. 4, leave to appeal to C.A. ref'd March 15, 2013 (unreported), leave to appeal ref'd, [2013] S.C.C.A. No. 201

[87] *Jeremiah v. Ontario, supra*, para. 45; *Asgedom v. Ontario (Minister of Community and Social Services)* (2010), 259 O.A.C. 144 (Div. Ct.), para. 16; *Canadian Chiropractic Assn. v. Lewis Inquest (Coroner of)* (2011), 285 O.A.C. 122 (Div. Ct.), para. 21

[88] Affidavit of Blancher-Smith, paras. 65-66, Crown's Responding Application Record, p. 27

November 16, 2011 counsel for the Applicant wrote to the Director asking that Ontario consider the *Keewatin* trial decision before accepting the Production Closure Plan. The Applicant could have initiated judicial review proceedings challenging Ontario's jurisdiction based on the *Keewatin* trial decision immediately following acceptance of the Production Closure Plan.[89]

111. The Court may dismiss an application for delay where a respondent can point to prejudice either to itself, or to others.[90] Ontario adopts the submissions of Rubicon on this issue, found at paragraphs 59 and 61 of its factum.

112. Accordingly, these Respondents submit that this Court should dismiss the within Application for Judicial Review and decline to grant the relief sought by the Applicant.

PART IV – ORDER REQUESTED

113. These Respondents respectfully request that the within Application for Judicial Review be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of March, 2014.

for _____
Walter Myrka

_____
Manizeh Fancy

for _____
Christine Perruzza

Counsel for the Respondents, the Minister of Northern Development and Mines and the Director of Mine Rehabilitation for the Ministry of Northern Development and Mines

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[89] Affidavit of Chief Cameron, paras. 70, 73, Application Record, p. 27-28
[90] *Lansdowne Park Conservancy v. Ottawa (City),* 2012 ONSC 1975 (Div. Ct.), para. 32, leave to appeal to C.A. refused August 28, 2012 (unreported), leave to appeal dismissed, [2012] S.C.C.A. No. 463

SCHEDULE "A"

Authorities Referred To:

1. *Keewatin v. Ontario (Minister of Natural Resources)*, 2011 ONSC 4801; rev. (2013), 114 O.R. (3d) 401 (C.A.); leave to appeal granted [2013] S.C.C.A. No. 215

2. *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429

3. *Amalorpavanathan v. Ontario (Minister of Health and Long-term Care)* (2013), 313 O.A.C. 29 (Div. Ct.)

4. *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202

5. *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)* (2009), 95 Admin. L.R. (4th) 229 (S.C.)

6. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511

7. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550

8. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650

9. *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2013 BCSC 1068

10. *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227

11. *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* (2013), 51 B.C.L.R. (5th) 380 (S.C.)

12. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

13. *Ahousat First Nation v. Canada (Fisheries and Oceans)* (2008), 297 D.L.R. (4th) 722 (F.C.A.)

14. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388

15. *Wahgoshig First Nation v. Solid Gold Resources Corp et al.* (2011), 108 O.R. (3d) 647 (Sup. Ct.)

16. *Yellowknives Dene First Nation v. Canada (Attorney General)* (2010), 377 F.T.R. 267

17. *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* (2013), 49 B.C.L.R. (5th) 302 (C.A.); leave to appeal to SCC ref'd February 27, 2014 (unreported)

18. *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)* (2013), 50 B.C.L.R. (5th) 86 (S.C.)

19. *Beckman v. Little Salmon/Carmacks First Nation,* [2010] 3 S.C.R. 103

20. *Jeremiah v. Ontario* (2008), 83 Admin. L.R. (4th) 126 (Div. Ct.)

21. *PPG Industries Canada v. A-G Canada*, [1976] 2 S.C.R. 739

22. *Re Harelkin and University of Regina* [1979] 2 S.C.R. 561

23. *Becker v. Ontario*, 2012 ONSC 6946 (Div. Ct.); leave to appeal to C.A. ref'd March 15, 2013 (unreported); leave to appeal ref'd, [2013] S.C.C.A. No. 201

24. *Asgedom v Ontario (Minister of Community and Social Services)* (2010), 259 O.A.C. 144 (Div. Ct.)

25. *Canadian Chiropractic Assn v Lewis Inquest (Coroner of)* (2011), 285 O.A.C. 122 (Div. Ct.)

26. *Lansdowne Park Conservancy v. Ottawa (City),* 2012 ONSC 1975 (Div. Ct.); leave to appeal to C.A. refused August 28, 2012 (unreported); leave to appeal dismissed, [2012] S.C.C.A. No. 463

SCHEDULE "B"

***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109(1), (2), (4)**

Notice of constitutional question

109.(1)Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2)If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

...

Right of Attorneys General to be heard

(4)Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 (U.K.), s. 35(1)**

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

***Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)**

Applications for judicial review

2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

***Mining Act*, R.S.O. 1990, c. M.14, ss.2, 139(1), 140, 141, 143(1), 145(2)-(5)**

R.S.O. 1990, CHAPTER M.14

Historical version for the period April 4, 2011 to October 31, 2012.

Last amendment: 2010, c. 18, s. 23.

...

Purpose

2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment. 2009, c. 21, s. 2.

...

PART VII
REHABILITATION OF MINING LANDS

Definitions and application of Part
Definitions

139. (1) In this Part,

"advanced exploration" means the excavation of an exploratory shaft, adit or decline, the extraction of prescribed material in excess of the prescribed quantity, whether the extraction involves the disturbance or movement of prescribed material located above or below the surface of the ground, the installation of a mill for test purposes or any other prescribed work; ("exploration avancée")

...

"closure plan" means a plan to rehabilitate a site or mine hazard that has been prepared in the prescribed manner and filed in accordance with this Act and that includes provision in the prescribed manner of financial assurance to the Crown for the performance of the closure plan requirements; ("plan de fermeture")

...

"mine production" means mining that is producing any mineral or mineral-bearing substance for immediate sale or stockpiling for future sale, and includes the development of a mine for such purposes; ("production minière")

...

ADVANCED EXPLORATION AND MINE PRODUCTION

Advanced exploration

140. (1)No proponent other than a proponent who is subject to a closure plan shall commence or recommence advanced exploration without,

(a) giving notice to the Director in the prescribed form and manner;

(b) giving public notice under subsection (2) at the prescribed time and in the prescribed form and manner, if required by the Director;

(c) filing a certified closure plan with the Director as required under subsection (3); and

(d) receiving a written acknowledgment of receipt for the certified closure plan from the Director. 1996, c. 1, Sched. O, s. 26.

Public notice

(2) Within 45 days after the receipt of the notice under clause (1) (a), the Director may require the proponent to give public notice of the advanced exploration project at the prescribed time and in the prescribed form and manner. 1996, c. 1, Sched. O, s. 26.

Closure plan

(3) The proponent of an advanced exploration project shall file with the Director a closure plan certified in the prescribed form and manner certifying that the plan complies with the prescribed requirements and, if the proponent has been required to give public notice, the proponent shall file the closure plan after giving the public notice. 1996, c. 1, Sched. O, s. 26.

Acknowledgment of receipt

(4) Within 45 days after the filing of the certified closure plan, the Director shall,

(a) acknowledge receipt, in writing, of the closure plan to the proponent; or

(b) return the closure plan for refiling if it does not sufficiently address all of the prescribed reporting requirements for a certified closure plan. 1996, c. 1, Sched. O, s. 26.

Effect of acknowledgment

(5) The certified closure plan of a proponent who receives a written acknowledgment of receipt under clause (4) (a) is considered filed as of the date indicated on the written acknowledgment of receipt. 1996, c. 1, Sched. O, s. 26.

Mine production

141. (1)No proponent other than a proponent who is subject to a closure plan shall commence or recommence mine production without,

(a) giving notice to the Director in the prescribed form and manner;

(b) giving public notice at the prescribed time and in the prescribed form and manner;

(c) filing a certified closure plan with the Director as required under subsection (2); and

(d) receiving a written acknowledgment of receipt for the certified closure plan from the Director. 1996, c. 1, Sched. O, s. 26.

Closure plan

(2) After public notice has been given under clause (1) (b), the proponent shall file with the Director a closure plan certified in the prescribed form and manner certifying that the plan complies with the prescribed requirements. 1996, c. 1, Sched. O, s. 26.

Acknowledgment of receipt

(3) Within 45 days after the filing of the certified closure plan, the Director shall,

(a) acknowledge receipt, in writing, of the closure plan to the proponent; or

(b) return the closure plan for refiling if it does not sufficiently address all of the prescribed reporting requirements for a certified closure plan. 1996, c. 1, Sched. O, s. 26.

Effect of acknowledgment

(4) The certified closure plan of a proponent who receives a written acknowledgement of receipt under clause (3) (a) is considered filed as of the date indicated on the written acknowledgment of receipt. 1996, c. 1, Sched. O, s. 26.

...

CLOSURE PLANS

Compliance with certified closure plan

143. (1)A proponent who has filed a certified closure plan under this Part shall comply with the closure plan. 1996, c. 1, Sched. O, s. 26.

...

FINANCIAL ASSURANCE

...

Director's order

145. (2) If the Director has reasonable and probable grounds for believing that a rehabilitation measure required by a filed closure plan in respect of which financial assurance was given has not been or will not be carried out in accordance with the plan, he or she may, by order, provide for the performance of the rehabilitation measure in the manner set out in subsection (5). 1996, c. 1, Sched. O, s. 26.

Notice

(3) The Director shall give the proponent written notice of his or her intention to issue the order referred to in subsection (2) at least 15 days prior to the date the order is to be issued. 1996, c. 1, Sched. O, s. 26.

Parties affected

(4) Both the notice and the order referred to in this section shall be directed,

(a) to the proponent who filed the closure plan or to their successor; and

(b) to any person who, to the Director's knowledge, provided the financial assurance for or on behalf of the proponent or to that person's successor or assignee. 1996, c. 1, Sched. O, s. 26.

Realization of security

(5) Upon the issuance of an order by the Director under subsection (2), the Crown may use any cash, realize any letter of credit or bond or enforce any other security, guarantee or protection provided or obtained as financial assurance for the performance of the rehabilitation measures and may carry out those measures, or appoint an agent to do so, as the Director considers necessary. 1996, c. 1, Sched. O, s. 26.

1. ***Mine Development and Closure under Part VII of the Act*, O. Reg. 240/00, ss. 3, 11-12, 13**

ONTARIO REGULATION 240/00

Historical version for the period October 31, 2011 to October 1, 2012.
Last amendment: O. Reg. 229/11.

...

3. (1) For the purposes of Part VII of the Act and this Regulation, "advanced exploration" includes the following types of work:

1. Exploration carried out underground involving the construction of new mine workings or expanding the dimensions of existing mine workings.
2. Exploration involving the reopening of underground mine workings by the removal of fixed or permanently fastened caps or bulkheads, or involving the excavation of backfilled shafts, raises, adits or portals.
3. Exploration that may alter, destroy, remove or impair any rehabilitation work done in accordance with Part VII of the Act or a filed closure plan.
4. Excavation of material in excess of 1,000 tonnes;
5. Surface stripping on mining lands where the surface area over which the surface stripping is carried out is greater than 10,000 square metres, or where the volume of surface stripping is greater than 10,000 cubic metres, except where all of the following are satisfied:
   i. Surface stripping is carried out in two or more separate areas on the mining lands.
   ii. The edges of each area where surface stripping is carried out are separated by a minimum of 500 metres.
   iii. In each area where surface stripping is carried out,
      A. the surface area over which the surface stripping is carried out is not greater than 10,000 square metres, and
      B. the volume of surface stripping is not greater than 10,000 cubic metres.
6. Surface stripping on mining lands where the area over which the surface stripping is carried out is greater than 2,500 square metres or where the volume of the surface stripping is greater than 2,500 cubic metres, if the surface stripping is carried out within 100 metres of a body of water. O. Reg. 240/00, s. 3 (1); O. Reg. 282/03, s. 1; O. Reg. 194/06, s. 1.

(2) In the definition of "advanced exploration" in subsection (1),

"material" means rock, ore or any other substance excavated during the process of developing, mining, evaluating or testing any mineral or mineral deposit, but does not include excavated overburden;

"surface stripping" means the removal of overburden to expose bedrock or other material. O. Reg. 240/00, s. 3 (2).

...

MINE REHABILITATION CODE

4. (1) All persons engaged in the rehabilitation of mines and mine hazards shall comply with the standards, procedures and requirements of the Mine Rehabilitation Code of Ontario set out in Schedule 1. O. Reg. 240/00, s. 4 (1).

...

CLOSURE PLAN

11. For the purpose of the reporting requirements referred to in clauses 140 (4) (b) and 141 (3) (b) of the Act, a closure plan shall include at least the items and information set out in Schedule 2 in the order in which the Schedule sets out the items and information to be included. O. Reg. 282/03, s. 2.

12. (1) A proponent is solely responsible for ensuring that the measures contained in a closure plan filed or approved for the rehabilitation of a project site under Part VII of the Act are carried out in accordance with it, including any amendments to it filed with or approved by the Director. O. Reg. 240/00, s. 12 (1).

(1.1) In subsections (2) to (10), a reference to a closure plan includes an amendment to a closure plan. O. Reg. 282/03, s. 3 (1).

(2) A closure plan filed under Part VII shall contain the following certificate signed by the proponent where the proponent is an individual, or the chief financial officer and one other senior officer where the proponent is a corporation:

I (We) hereby certify that,

(a) the attached closure plan complies in all respects with the *Mining Act* and this Regulation, including the Code;

(b) the proponent relied upon qualified professionals in the preparation of the closure plan, where required, under the *Mining Act* and this Regulation, including the Code;

(c) the cost estimates of the rehabilitation work described in the attached closure plan are based on the market value cost of the goods and services required by the work;

(d) the amount of financial assurance provided for in the attached closure plan is adequate and sufficient to cover the cost of the rehabilitation work required in order to comply with the *Mining Act* and this Regulation, including the Code;

(e) the proponent has carried out reasonable and good faith consultations with appropriate representatives of all aboriginal peoples affected by the project;

(f) the attached closure plan constitutes full, true and plain disclosure of the rehabilitation work currently required to restore the site to its former use or condition or to make the site suitable for a use the Director sees fit in accordance with the *Mining Act* and this Regulation, including the Code. O. Reg. 240/00, s. 12 (2).

(3) A closure plan filed under Part VII shall include all certificates required by the closure plan, signed by the person providing the certificate. O. Reg. 240/00, s. 12 (3).

(4) A certificate shall,

(a) state the name, address, occupation and qualifications of the person providing it;

(a.1) provide a statement of the specific aspects of the closure plan with respect to which the certificate relates;

(b) indicate whether the person providing the certificate personally examined the project or examined information related to it provided by another source;

(c) state the date of an examination carried out under clause (b);

(d) if the certificate is not based on personal examination of the project, indicate the source of the information assessed before making the certificate; and

(e) contain details of any direct or indirect interest, current or expected, of the person providing the certificate or of a person who has provided information to that person, in the project of a corporate proponent or any of the proponent's affiliates, including any direct or indirect beneficial ownership in the securities of the proponent or any of its affiliates. O. Reg. 240/00, s. 12 (4); O. Reg. 282/03, s. 3 (2); O. Reg. 194/06, s. 3.

(f) Revoked: O. Reg. 282/03 s. 3 (2).

(5) For the purposes of clause (4) (e), a corporation shall be deemed to be affiliated with another corporation if one of them is the subsidiary of the other, both are subsidiaries of the same corporation or each of them is controlled by the same person. O. Reg. 240/00, s. 12 (5); O. Reg. 282/03, s. 3 (3).

(6) The proponent shall submit eight copies of the closure plan document to the Director but may be required to submit as many as 11 if the interests of a municipality, a First Nation or some other entity are concerned. O. Reg. 240/00, s. 12 (6).

(7) If any item of information required in a closure plan is not applicable to a project, the proponent shall specifically refer to the item of information in the closure plan and state that the item is not applicable. O. Reg. 240/00, s. 12 (7).

(8) If a closure plan relates to a project with respect to an existing or abandoned site and information is required regarding conditions or events that existed or occurred prior to the start of the project, the proponent shall provide the information that is reasonably available and, where such information is not reasonably available, shall indicate what searches have been undertaken with a view to providing the required information, including a list of any sources searched. O. Reg. 240/00, s. 12 (8).

(9) A plan or map, or additional detail or background information, required in a closure plan may appear in an appendix to the closure plan if the proponent specifically refers to the plan, map, detail or information under the item of information required in the closure plan to which the plan, map, detail or information relates. O. Reg. 240/00, s. 12 (9).

(10) An appendix to a closure plan forms part of the closure plan. O. Reg. 240/00, s. 12 (10).

FINANCIAL ASSURANCE

13. (1) A closure plan shall specify the form and amount of the financial assurance to be provided by the proponent in respect of the project. O. Reg. 240/00, s. 13 (1).

(2) The financial assurance shall be submitted with the closure plan. O. Reg. 240/00, s. 13 (2).